(19,209)

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 178.

WESTERN ELECTRICAL SUPPLY COMPANY, *Plaintiff in Error*,

vs.

ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY, *Defendant in Error.*

In Error to the Supreme Court of the State of South Carolina.

STATEMENT OF PLAINTIFF IN ERROR.

This was a suit com nenced November 7, 1900, by defendant in error, a local corporation of South Carolina, against plaintiff in error, a corporation of the city of St. Louis, state of Missouri, for damages alleged to have been suffered on account of alleged failure in guarantee of a certain electric light machine furnished by plaintiff in error to defendant in error.

Service was attempted to be had by serving one Schminke, a traveling salesman of the plaintiff in error. A special appearance was entered by plaintiff in error objecting to the jurisdiction of the court, and a motion was filed to quash the service on the ground that the court had not acquired jurisdiction of plaintiff in error; such special appearance is proper under the practice in the state of South Carolina. The first affidavits filed by plaintiff in error in support of the motion to quash the service, stated that Schminke, at the time of the service, was not an officer of plaintiff in error, nor a director thereof; that he was simply a traveling salesman for it; that his duties and powers were solely to take orders for the sale of merchandise; that he was a resident of the city of New Orleans, Louisiana; that plaintiff in error had no office or place of business in the state of South Carolina; that Schminke was sent to the town of Abbeville, where the service was had, to examine into the running of the machine in controversy, and report the facts to the plaintiff in error at the request of defendant in error; that the contract between plaintiff in error and defendant in error, out of which the alleged cause of action arose, was not made in the state of South Carolina. (Record, page 13). Counter affidavits filed by defendant in error, simply identified certain letters passing between the parties, which, in effect, confirmed the surpose for which Schminke would be sent, i. e., to inquire into the trouble and reporting the results of his investigation to plaintiff in error. Nothing contained in these letters indicates that Schminke was to be given any power to settle the controversy (record, pages 15, 16, 17).

The trial court sustained the motion to quash and dismissed the cause. Upon appeal to the supreme court by defendant in error, that court reversed the trial court. The opinion of the court is found in 61 S. C. 361.

In that court the constitutionality of the statute authorizing the service was discussed at length and decided adversely to plaintiff in error.

The first opinion rendered, Abbeville C. L. & P. Co. vs. Western Electrical Supply Co., 61 S. C. 361, is based upon two grounds:

First—That because plaintiff in error had sold the machine in question to a South Carolina corporation and had received part payment on the same (although there was nothing in the affidavits to that effect), therefore, the courts of South Carolina were, under the statutes of that state, bound absolutely and "irrefutably" to hold that *the contract was made in and was to be performed in South Carolina*, and that *plaintiff in error was engaged in business in South Carolina*. From these premises the court drew the conclusion that plaintiff in error must be held to be engaged as a foreign corporation in business in that state, and service upon any agent was a valid service.

The statute quoted by the court to sustain this astounding and unconstitutional proposition are sections 4 and 5 of an act approved March 2, 1897, regulating foreign corporation acts of 1897, page 484, which reads as follows:

Section 4. . . . "It shall be taken and deemed to be the fact, irrebutable, and part and parcel of all contracts entered into between such corporation (foreign) and a citizen or corporation of this state;

that the taking or receiving from any citizen or corporation of this state of any charge, fee, payment, toll, import, premium, or other moneyed or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this state, and that the place of the making and of the performance of any such contract shall be deemed and held to be within this state, anything contained in such contract or in any rules or by-law of such corporation to the contrary notwithstanding."

Sec. 5. That all such corporations hereafter doing business in this state, as defined in this act, shall be deemed and held to be doing such business under and in pursuance of the terms and conditions of this act, and that such terms and conditions shall be deemed and taken in all the courts of this state to be a part and parcel of all contracts hereafter entered into between such corporations and a citizen or corporation of this state, anything contained in such contract or in any rules or by-laws of such corporation to the contrary notwithstanding.

Second.—That the service upon any agent, as authorized in section 155, R. S. of South Carolina, amended by act approved March 2, 1899, was not repugnant to the constitution of the United States and reviewing the cases in this court.

This section, as amended, so far as applicable, reads as follows:

. . . . . .

"The summons shall be served by delivering a copy thereof as follows: . . . Such service can be made in respect to a foreign corporation only when

it has property within the state, or the cause of action arose there, or when such service shall be made in this state personally upon the president, cashier, treasurer, attorney or secretary, or any agent thereof."

Upon the cause being remanded to the trial court, plaintiff in error again entered a plea to the jurisdiction, and filed affidavits similar to ones originally filed, and in addition the further fact was stated that plaintiff in error had never been engaged in business in the state of South Carolina, and that the contract in question was to be by its terms and actually was performed in the state of Ohio, and that it had a just and meritorious defense to the action.

The plea of plaintiff in error to the jurisdiction of the court specifically stated (record, p. 19), that its special appearance, the second time, was for the purpose of finally appealing to the Supreme Court of the United States. That section of 155 of the code of civil procedure of South Carolina, as amended March 21, 1899, providing for service upon foreign corporations, and "an act to further prescribe the terms and conditions upon which foreign corporations may do business within the state," approved March 1, 1897, are both in controvention of the fifth and fourteenth amendment to the constitution of the United States.

The trial court overruled the plea on the authority of the decision of the Supreme Court of South Carolina, and the plaintiff in error having refused to plead further, rendered judgment in favor of the defendant in error against plaintiff in error. An appeal was had to the Supreme Court of South Carolina, and that court heard the appeal, and after referring to the

affidavits filed, affirmed the judgment of the lower court on the ground that the matter was *res adjudicata*. Writ of error was then sued out by plaintiff in error to this court. The assignments of error are in brief: That the Supreme Court of South Carolina erred in holding that subdivision one of section 155 of the Code of Civil Procedure of South Carolina, providing for service of summons on a foreign corporation, as amended by the act of General Assembly of South Carolina, striking out the word "resident," approved the 2d day of March, 1899, and also the act of the General Assembly of South Carolina entitled "an act to further prescribe the terms and conditions upon which foreign corporations may do business," approved the 2d day of March, 1897, are not repugnant to the fifth and fourteenth amendments of the constitution of the United States.

A simple statement of the history of this case would seem to be sufficient to show that this court has acquired jurisdiction. Plaintiff in error could not appeal from the first decision of the Supreme Court of South Carolina because that was not a final judgment. It could not appeal to this court from the judgment of the trial court, because that court was not the court of last resort. It could appeal to the Supreme Court of South Carolina even though that court would affirm the judgment on the ground that the question was *res adjudicata*. Plaintiff in error followed the method prescribed by this court in Great Western Telegraph Co. vs. Burnham, 162 U. S. 339, and is here on the authority of that case.

That there is a constitutional question involved is equally plain. Though plaintiff in error is not, and

has not, been engaged in business in South Carolina, has no agent there, and although the contract in question was not performed there nor meant by its terms to be performed there, yet because it is a foreign corporation and has dared to sell a local corporation a machine, the law ofthat state compels its courts to hold that it is engaged in business there, and the contract was performed there and was to be performed there. This is a discrimination between citizens and non-residents with a vengeance. Is there any wonder that plaintiff in error was afraid to submit his defense when equal protection was not afforded to the non-resident corporation?

This court has gone far in upholding the jurisdiction of the state courts, but it has never gone to the extent of holding that a mere traveling salesman, inveigled into the state on a false pretext, is an agent with a representative capacity, as defined in Conn. Mutual Life Ins. Co. vs. Spratley, 172 U. S. 602.

We respectfully submit, therefore, that a constitutional question is involved and that plaintiff in error has adopted the proper method of bringing it before this court.

LEE W. GRANT,
RALSTON & SIDDONS,
For Plaintiff in Error.